

Alabama Rules of Appellate Procedure

Rule 5.

Appeal by permission.

(a) *Petition for permission to appeal.* A party may request permission to appeal from an interlocutory order in civil actions under limited circumstances. Appeals of interlocutory orders are limited to those civil cases that are within the original appellate jurisdiction of the Supreme Court. A petition to appeal from an interlocutory order must contain a certification by the trial judge that, in the judge's opinion, the interlocutory order involves a controlling question of law as to which there is substantial ground for difference of opinion, that an immediate appeal from the order would materially advance the ultimate termination of the litigation, and that the appeal would avoid protracted and expensive litigation. The trial judge must include in the certification a statement of the controlling question of law.

(1) PRESUMPTIVELY REASONABLE TIME FOR TRIAL JUDGE'S CERTIFICATION FOR PERMISSIVE REVIEW. The presumptively reasonable time for the trial judge to enter the certification required in subdivision (a) is within 28 days of the entry of the interlocutory order sought to be appealed. If a certification is made outside this presumptively reasonable time, the petition shall include a statement of circumstances constituting good cause for the Supreme Court to consider the petition, notwithstanding that the certification was entered beyond the presumptively reasonable time of 28 days.

(2) TIME FOR FILING THE PETITION WITH THE SUPREME COURT. The petition for permission to appeal shall be filed with the clerk of the Supreme Court within 14 days (2 weeks) after the entry of the certification by the trial judge under Rule 5(a). The petition shall include a certificate of service on all other parties to the action in the trial court.

(b) *Content of petition; Answer.*

(1) PETITION. The petition shall contain a statement of the facts necessary to an understanding of the controlling question of law determined by the order of the trial court, supported by reference to the appendix accompanying the petition; a statement of the question itself, as stated by the trial court in its certification; and a statement of the reasons why a substantial basis exists for a difference of opinion on the question, why an immediate appeal would materially advance the termination of the litigation, and why the appeal would avoid protracted and expensive litigation.

(2) APPENDIX. The petition shall have annexed thereto an appendix including (i) a copy of the order from which appeal is sought and of any findings of fact, conclusions of law, and opinion relating thereto, (ii) a copy of the certification required by Rule 5(a), (iii) any other order or opinion or parts of the record that would be essential to an understanding of the matters set forth in the petition, and (iv) an index listing separately each document in the appendix. The appendix shall be separated from the petition by a divider or a tab, and each document within the appendix shall be separated by a divider or an appropriate tab to identify and assist in locating the documents.

(3) ANSWER. Within 14 days (2 weeks) after service of the petition, an adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on all other parties to the action in the trial court. No reply by the petitioner to the answer is permitted. The petition and answer shall be submitted without oral argument unless otherwise ordered.

(c) *Grant of permission; security for costs; filing of record.* If permission to appeal is granted by the Supreme Court, the appellant shall file security for costs as required by Rule 7 and the docket fee as required by Rule 12(a) within 14 days (2 weeks) after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 12. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of the entry of the order granting permission to appeal. A notice of appeal need not be filed.

(d) *Effect on trial court proceedings.* A pending petition or appeal hereunder shall not stay proceedings in the trial court unless the trial judge or the Supreme Court shall so order.

(e) *Form and length of petition and answer; number of copies.* The petition and any answer to the petition shall comply with the provisions of Rule 32(b)(4) governing form and shall not exceed 20 pages, as also provided in Rule 32(b)(4). A sufficient number of copies shall be filed with the original with the clerk of the Supreme Court to provide each Justice of the Court with one copy, but the Court may direct that additional copies be furnished.

[Amended 2-9-82; Amended 11-19-96, eff. 1-1-97; Amended 11-20-2001, eff. 6-1-2002; Amended 10-13-2015; Amended 10-19-2017, eff. 1-1-2018.]

Committee Comments

Rule 5 is a composite of FRAP Rule 5 and 28 U.S.C. § 1292(b). It supersedes Title 7, § 755. Alabama Rule 5, however, extends the time from the 7 days provided by FRAP Rule 5 to 14 days for the adverse party to file an answer in opposition. Such answer is filed with the clerk of the Supreme Court, and the answer must be served on all other parties to the action in the trial court. The number of copies is to be one for each justice of the Supreme Court, unless the Court directs that additional copies be filed. See Form 16 for petition and Form 17 for certificate of trial judge.

The rule does not apply to criminal cases, since it was felt that the potentiality for abuse in criminal cases on such matters as search warrants, etc., was extremely great. Neither does the rule apply to cases appealable to the Court of Civil Appeals.

Court Comment to Amendment to Rule 5(a) Effective January 1, 1997

The amendment to Rule 5(a) removes gender specific pronouns.

Court Comment to Amendment to Rule 5 Effective June 1, 2002

The amendment to Rule 5(a) is intended to provide a limited window of opportunity for the filing of a petition pursuant to this section. In adopting the time limits set forth in Rule 5(a), the Supreme Court contemplated that, on occasion, orders containing the required certification may be issued subsequent to the trial court's substantive ruling on the legal issues that form the basis of the controlling question of law over which there is a substantial difference of opinion. The Court has noted, however, that in some instances the second prong of this process—the issuance of the order by the trial court setting forth its findings and its certification that the matter is appropriate for interlocutory review—is not done in a timely manner. For this reason, the Supreme Court has determined that a presumptively reasonable time limit between the issuance of the substantive order and the issuance of the certification order is desirable, and that 28 days is a reasonable time limit within which the trial court must certify the previously issued substantive ruling for permissive appeal. Rule 5 has been amended to include this presumptively reasonable time period in which the trial judge's certification must be made. While this time limit is not a jurisdictional requirement, if a certification is made outside the presumptively reasonable time, the rule now requires that the petition include a statement of circumstances constituting good cause for the Supreme Court to consider the petition, notwithstanding that it was certified beyond the presumptively reasonable time.

Committee Comments to Amendment to Rule 5(b)
Effective January 1, 2018

Rule 5(b) was modified to require that a separate appendix be filed with all petitions for permissive appeal. The purpose of the appendix is to permit the parties to prepare and transmit copies of those portions of the record deemed necessary to an understanding of the issues presented. The Committee suggests that the documents in the appendix be separated into volumes of no more than 200 pages. The appendix should include an index to the documents contained in the appendix and should be divided to identify and assist in locating a specific document. The hard copy of any appendix and documents should be divided with tabs. In lieu of tabs, any appendix filed electronically should be demarcated by cover sheets that clearly identify the particular document that follows (e.g., "Exhibit ____" or "Tab ____").

Note from the reporter of decisions: The order amending Rule 5, Rule 21(d), Rule 27(d), Rule 28, Rule 32, Rule 39(d), Rule 39(f), Rule 39(h), and Rule 40(g), effective June 1, 2002, is published in that volume of *Alabama Reporter* that contains Alabama cases from 798 So.2d.

Note from the reporter of decisions: The order amending Rule 32(b)(4), Rule 5(b), Rule 5(d), and Rule 39(e), Ala. R. App. P., effective October 13, 2015, is published in that volume of *Alabama Reporter* that contains Alabama cases from 173 So. 3d.

Note from the reporter of decisions: The order amending Rule 5(b) and adopting the Committee Comments thereto and adopting Rule 21(f) and the Committee Comments thereto effective January 1, 2018, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.